

Amendments to
Secs. 2, 3, and 11
Order 4-89
Title 8 California Code of Regulations 11040
Effective August 21, 1993

Amendments to Sections 2, 3, and 11 of
INDUSTRIAL WELFARE COMMISSION ORDER NO. 4-89
REGULATING

**PROFESSIONAL, TECHNICAL, CLERICAL, MECHANICAL
AND SIMILAR OCCUPATIONS**

These changes affect only the health care industry

OFFICIAL NOTICE

To employers and representatives of persons in occupations covered by IWC Order No. 4-89 who work in the **health care industry**:

The Industrial Welfare Commission (IWC) Of the State of California proceeded according its authority in the Labor Code and the Constitution of California, and concluded that Sections 2, 3, and 11 of its Order 4-89, regulating Professional, Technical, Clerical, Mechanical, and Similar Occupations, should be amended to affect persons who work in the health care industry. The IWC promulgated these amendments to Order 4-89, made pursuant to the special provisions of Labor Code Section 1182.7, on June 29, 1993. The amendments become effective on August 21, 1993. The amendments become effective on August 21, 1993.

All other provisions of Section 2, Definitions, Section 3, Hours and Days of Work, and Section 11, Meal Periods, and all other sections of Order 4-89 remain in full force and effect.

The amendments allow more flexibility with respect to work scheduling, managerial and administrative exemptions and the definition of hours worked for compensation. They apply only to persons covered by this order who work in the health care industry. This includes, but is not limited to, all employees who work for doctors' or dentists' offices, clinics medical laboratories, kidney dialysis clinics, home health care agencies, and other health/allied services.

The amendments printed in this mailer must be posted next to the calendar-style poster on which the entire Order 4-89 is printed, and which should already be posted where employees can read it.

The reasons for the changes accompany the amendments in the Statement as to the Basis, provided for you information. If you have any questions on interpreting the amendments or how they apply to you, please contact your nearest Division of Labor Standards Enforcement office, list below. If you need additional copies of this amendment, please write to:

**Division of Labor Standards Enforcement,
P. O. Box 420603
San Francisco, CA 94142-0603**

2. DEFINITIONS

(The following language is added to Section 2, *Definitions*, subsection (H).)

(H)...Within the health care industry, the term "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.

(The following language is added to Section 2, *Definitions*, subsection (k).)

(K)...Within the health care industry, the term "primarily" as used in Section 1, Applicability, means (1) more than one-half the employee's work time as a rule of thumb or, (2) if the employee does not spend over 50 percent of the employee's time performing exempt duties, where other pertinent factors support the conclusion that management, managerial, and /or administrative duties represent the employee's primary duty. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, the employee's relative freedom from supervision, and the relationship between the employee's salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor.

3. HOURS AND DAYS OF WORK

(The following is added to Section 3, *Hours and Days of Work*, as subsection (J).)

(J) Employees in the health care industry may work on any days any number of hours a day up to twelve (12) without overtime, as long as the employer and at least two-thirds (2/3) of the affected employees in a work unit agree to this flexible work arrangement, in writing, in a secret ballot election before the performance of the work, provided:

(1) An employee who works beyond twelve (12)

(3) Prior to the secret ballot vote, any employer who proposes to institute a flexible work arrangement shall make a disclosure in writing to the affected employees, including the effects of the proposed arrangement on the employees' wages, hours, and benefits. Such a disclosure shall include meeting(s), duly noticed, held at least fourteen (14) days prior to voting, for the specific purpose of discussing the effects of the flexible work arrangement. Failure to comply with this section shall make the election null and void;

(4) The same overtime standards shall apply to employees who are temporarily assigned to a work unit covered by this subsection;

(5) Any employer who institutes an arrangement pursuant to this subsection shall make a reasonable effort to find an alternative work assignment for any employee who participated in the secret ballot election and is unable or unwilling to comply with the agreement. An employer shall not be required to offer an alternative work assignment to an employee if an alternative assignment is not available or if the employee was hired after the adoption of the flexible work arrangement. There is no maximum number of employees whom an employer may voluntarily accommodate consistent with its desire and ability to do so;

(6) After a lapse of twelve (12) months and upon petition of a majority of the affected employees, a new secret ballot election shall be held and a two-thirds (2/3) vote of the affected employees shall be required to reverse the arrangement above. If the arrangement is revoked, the employer shall comply within sixty (60) days. Upon a proper showing by the

(The following is: *Hours and Days* (K).)

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11. MEAL PER

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<p>hours in a workday shall be compensated at double the employee's regular rate of pay for all hours in excess of twelve (12);</p> <p>(2) An employee who works in excess of forty (40) hours in a workweek shall be compensated at one and one-half (1 ½) times the employee's regular rate of pay for all hours over forty (40) hours in a workweek;</p>	<p>employer of undue hardship, the Division may grant an extension of time for compliance;</p> <p>(7) For purposes of this subsection, affected employees may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit in this subsection are met</p>	<p>CALIFORNIA</p> <p>Lynnel Pollack, (</p> <p>James rude</p> <p>Robert Hanna</p> <p>Donald Novey</p> <p>Dorothy Vuksich</p>
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**Statement as to the Basis of Amendments to Sections 2, 3, and 11 of
Industrial Welfare Commission Order No. 4-89**

<p>Labor Code Sec. 1182.7 requires Industrial Welfare Commission (IWC) to provide accelerated review of petitions filed by organizations recognized in the health care industry who request amendments to an IWC order directly affecting only the health care industry. Under this authority, the California Association of Hospitals and Health Systems (CAHHS) petitioned the IWC to amend and/or clarify certain sections of Order 4, solely for employers and employees in the health care industry. The IWC accepted the petition which proposed to redefine "primarily" and "hours worked" to parallel federal law in Section 2, <i>Definitions</i>; to clarify and expand regulations regarding flexible schedules and overtime in Section 3, <i>Hours and Days of Work</i>; and to permit employees to waive meal periods in Section 11, <i>Meal Periods</i>. The IWC held three public hearings on its proposals in April 1993.</p> <p>After deliberating on all the evidence presented with respect to its proposals, the IWC adopted amendments to Order 4 for the health care industry on June 29, 1993, and offers the following statement as to the basis for its actions:</p> <p>2. DEFINITIONS</p> <p>Testimony suggested the current DLSE</p>	<p>resulted in less than 51 percent of the time being devoted to exempt duties. On June 29, 1993, the IWC adopted language consistent with the FLSA, which promoted clarity and compliance while providing needed flexibility to allow exempt executive and administrative employees to perform nonexempt duties without losing their exempt status. In response to public comment suggesting the term "other pertinent factors" was unclear and confusing to employees, the IWC clarified the meaning of that item by listing some, but not all, examples of pertinent factors.</p> <p>3. HOURS AND DAYS OF WORK</p> <p>Testimony supported the petitioner's claims that DLSE's interpretations regarding the flexible scheduling rules adopted in 1986 and 1988 limited desirable options for employees and frustrated the IWC's intent of more, not less, flexibility. Many employees told the IWC they voluntarily worked 12-hour shifts at a "reduced rate of pay," with overtime after eight hours a day.</p>	<p>so that an the health agree with work on a hours a da protective language ; arrangeme and emplo and weekl including allowing e overtime c long as th wages are twelve (12 case of we (40) hours Moreover clarified o regarding when not is necessa the same c apply to a unit regar time, on-c permanen The new r</p>
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interpretations of "hours worked" were "unduly narrow" resulting in "substantial confusion and serious technical problems," and consistency with the Fair Labor Standards Act (FLSA) would eliminate this confusion. In response to testimony presented at the public hearings that the reference to "29 CFR Part 785" was unclear, the IWC amended that language and referred to "the Fair Labor Standards Act" instead, a term more easily understood by the public. On June 29, 1993, the IWC adopted language to assure "hours worked" in the health care industry would be interpreted in accordance with the FLSA, the regulations interpreting the FLSA including, but not limited to, those contained in 29 CFR Part 785, and federal court decisions. The clarification confirms the IWC's intention that issues related to working time will be resolved consistently under state and federal law.

With respect to redefining "primarily" for the health care industry, the IWC decided since it had examined the professional component of the administrative/executive/professional exemption and adopted language to exempt learned and artistic professions as recently as 1989, it was time to respond to demands for a more flexible application of the executive/ administrative exemption than the rigid 51 percent rule. Employees testified current regulations sometimes resulted in treating an employee as nonexempt under a rigid application of a 51 percent rule, such as where emergency or other conditions

Although this practice is permissible, it sometimes adversely affected their benefits and pensions-in order to cope with DLSE's overly "restrictive" policies. Other employees said they preferred to "mix days off" and working the same days each week was an "unrealistic" practice. The revised language clarifies the IWC's original intent to maximize flexibility in scheduling so that the days and hours of work can vary. While some employees argued part-time employees who have flexible work arrangements should be paid premium wages when asked to work beyond their normal part-time arrangements, by the end of the public hearings, most employees agreed requiring premium wages for part-time or temporary employees who work less than 12 hours a day or 40 hours a week is unfair to full-time workers in the same work unit who earn straight time pay for the same daily and weekly hours. While a few employees suggested the "secret ballot election process" allowed under the IWC orders was "flawed" due to "lack of oversight," the Labor Commissioner testified DLSE had received few, if any, complaints regarding the election process.

After evaluating all the evidence, on June 29, 1993, the

IWC adopted its proposal to amend flexible scheduling rules

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